(3)

No. 89-1714

In the Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, SURVIVOR OF JOHN C. PAULEY,
PETITIONER

v.

BETHENERGY MINES, INC., AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

1. Whether the rebuttal provisions of a Department of Labor regulation satisfy Section 402(f)(2) of the Black Lung Benefits Act, which requires the Department to apply "[c]riteria * * * not more restrictive" than the criteria applied during an earlier phase of the black lung program.

2. Whether the statute, if construed to invalidate the Department's rebuttal provisions, violates the constitutional guarantee of due process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 890 F.2d 1295. The decision and order of the Benefits Review Board (Pet. App. 20a-22a) and the decision and order of the administrative law judge (Pet. App. 23a-41a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 44a-45a) was entered on December 7, 1989. The order denying the rehearing petition was entered on February 6, 1990. Pet. App. 42a-43a. The petition for a writ of certiorari was filed on May 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, provides benefits to former coal miners and their survivors for total disability or death due to pneumoconiosis. Disability claims filed by June 30, 1973, were considered by the Department of Health, Education, and Welfare (HEW) under regulations that included a presumption of entitlement to benefits (20 C.F.R. 410.490) that was available to certain claimants. Claims filed after that date are considered by the Department of Labor. Claims filed with the Department of Labor before April 1, 1980, are subject to Section 402(f)(2) of the statute, 30 U.S.C. 902(f)(2), which provides that the "[c]riteria" applied to those claims "shall not be more restrictive than the criteria applicable to a claim" adjudicated by HEW. See *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414, 417-419 (1988).

In response to Section 402(f)(2), Labor promulgated its own presumption regulation, 20 C.F.R. 727.203. While there were only two ways to invoke HEW's presumption (see 20 C.F.R. 410.490(b)(1)), there are five ways to invoke Labor's presumption. See 20 C.F.R. 727.203(a)(1) and (5). Once the presumption had been invoked, HEW's regulation specified that the presumption could be rebutted (1) by proving that the miner was doing his usual coal mine work or comparable work or (2) by proving that the miner was capable of doing such work. 20 C.F.R. 410.490(c)(1) and (2). In contrast, Labor's regulation specifies four rebuttal methods. The first two generally correspond to the two specified HEW methods. 20 C.F.R. 727.203(b)(1) and (2). The third and fourth Labor methods allow a party contesting entitlement to defeat a claim either (3) by proving that the disability or death of the miner did not arise in whole or in part from coal mine employment or (4) by proving that the miner does not or did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4).

2. In 1978, after about 30 years of coal mining, John Pauley applied for black lung benefits. Pet. App. 25a. A deputy commissioner in the Department of Labor's Office of Workers' Compensation Programs (OWCP) found him eligible for benefits, but respondent Bethenergy Mines, the responsible coal mine operator, contested eligibility and obtained a hearing before an administrative law judge. *Ibid.* The ALJ concluded that Pauley had properly invoked the presumption of eligibility for benefits based on his 30 years of coal mining and on x-ray evidence showing that he had pneumoconiosis. *Id.* at 4a, 36a.

Bethenergy conceded the existence of the disease and its relationship to coal mining. Pet. App. 4a, 36a. But it sought to rebut the presumption under Labor's third rebuttal provision by showing that, although Pauley was disabled, his disability did not arise in whole or in part from the disease. The ALJ concluded that the operator had succeeded in rebutting the presumption under Labor's regulation since the operator had shown that "pneumoconiosis is not a contributing factor in claimant's disability." *Id.* at 38a. Rather, the medical evidence showed that Pauley was disabled due to arthritis and residual hemipariesis resulting from a stroke. *Id.* at 36a-37a. However, the ALJ went on to hold that the third rebuttal provision in Labor's regulation is contrary to Section 402(f)(2) because there was no comparable rebuttal provision on the face of HEW's regulation. Accordingly, the ALJ held that "the claimant is entitled to benefits." Pet. App. 40a.

The Benefits Review Board affirmed. Pet. App. 20a-22a.[1]

[1] John Pauley died in December 1988, while the case was pending before the Benefits Review Board. His wife, Harriet Pauley, who is listed as the petitioner, was never formally substituted as a party before the Board or the court of appeals. We believe that if Mr. Pauley's death had been called to their attention, the Board or the court would have substituted Mrs. Pauley as a party. Because Mr. Pauley had been found eligible for benefits when he died, Pet. App. 23a-41a, Mrs. Pauley

3. The court of appeals reversed. Pet. App. 1a-19a. It began by noting that "[t]he purpose of the Benefits Act is to provide a recovery for a miner totally disabled at least in part by pneumoconiosis if the disability arises out of coal mine employment," and that the ALJ had made unchallenged findings that "Pauley's disability did not arise even in part out of coal mine employment." *Id.* at 12a, 13a. It then determined that Section 402(f)(2) did not require an award of benefits in that circumstance, for two reasons.

First, the court of appeals noted that, as part of the statutory definition of "total disability," Section 402(f)(2) requires that the criteria applied by the Secretary of Labor in determining whether someone is totally disabled must be no more restrictive than the criteria applied by HEW in making that determination. However, the court stated, "if Congress had intended 'criteria' under [Section 402(f)(2)] to include rebuttal criteria or criteria relating to matters other than those dealing with 'total disability' it would have said so directly rather than dealing with the matter diffidently in the section." Pet. App. 17a. Since the rebuttal provision at issue relates not to the question whether the claimant is disabled, but rather to the question whether the disability arose out of coal mine work, the court concluded that it is not contrary to Section 402(f)(2).

Second, the court noted that although there was "no case law indicating how the rebuttal provisions of 20 C.F.R. § 410.490 were applied by the Department of Health, Education, and Welfare," it did not believe that HEW would have awarded benefits under the facts of this case. Pet. App.

became eligible for these benefits as his survivor without having to refile or otherwise validate the claim. See 30 U.S.C. 932(*l*); *Rosebud Coal Sales Co.* v. *Weigand*, 831 F.2d 926, 927-928 (10th Cir. 1987); 20 C.F.R. 725.212. In May 1990, the government moved the Board to correct this oversight and substitute Mrs. Pauley as a party *nunc pro tunc*. On July 23, 1990, the Board issued an order stating that it "has no jurisdiction to consider the Director's request" because the case "is currently pending at the United States Supreme Court." The Director intends to seek reconsideration of this order.

17a. To the contrary, the court interpreted a cross-reference in HEW's regulation to 20 C.F.R. 410.412(a)(1)—which in turn refers to the *cause* of the claimant's disability—to authorize "rebuttal by a showing that the claimant's disability did not arise at least in part from coal mine employment." *Ibid.* Thus, the court concluded, the same result was required under both regulations, and Labor's regulation was not more restrictive than HEW's.

The court of appeals added that "there is an apparent conflict between other circuits as to issues similar to those before us. Compare *Youghiogheny & Ohio Coal Company* v. *Milliken*, 866 F.2d 195 (6th Cir. 1989), *with Taylor* v. *Peabody Coal Co.*, [892 F.2d 503 (7th Cir. 1989)]." Pet. App. 19a. The court decided not to "attempt to harmonize those cases." *Ibid.* The full court subsequently denied a petition for rehearing en banc, with one judge dissenting. *Id.* at 42a-43a.

ARGUMENT

Although we believe the decision of the court of appeals is correct, we agree with petitioner that the questions presented warrant review by this Court. The various decisions of the courts of appeals are not reconcilable, and the conflict has disrupted the administrative process. Moreover, even though Section 402(f)(2) applies only to claims filed before April 1, 1980, the conflict is significant because an estimated 2,000-3,500 claims are still subject to that Section.

1. In *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414 (1988), this Court held that the *invocation* portion of Labor's presumption (which is not at issue here) violated Section 402(f)(2)'s command to apply "criteria" no more restrictive than those applied by HEW. The Court did not decide whether Labor's *rebuttal* provisions were valid

because the respondents in *Sebben* had conceded their validity. 109 S. Ct. at 423. For the same reason, the Court did not decide whether application of Labor's rebuttal methods was constitutionally required. *Ibid.*

Since *Sebben*, four courts of appeals have addressed the validity of Labor's rebuttal provisions. The court below and the Sixth Circuit have upheld the provisions. Pet. App. 1a-19a; *Youghiogheny & Ohio Coal Co.* v. *Milliken*, 866 F.2d 195 (6th Cir. 1989). In both of those cases, miners invoked Labor's presumption by proving the existence of pneumoconiosis. Pet. App. 4a; 866 F.2d at 197. In both cases, benefits were denied because coal mine operators proved under Labor's third rebuttal method (20 C.F.R. 727.203(b)(3)) that the miners' disabilities did not arise in whole or in part from the disease. Pet. App. 4a-5a, 37a-38a; 866 F.2d at 197.

The Fourth and Seventh Circuits have invalidated parts of Labor's rebuttal regulation. In *Taylor* v. *Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), petition for cert. pending, No. 90-113 (filed July 17, 1990), an ALJ concluded that a miner who had invoked the presumption did not have pneumoconiosis, so that the relevant operator had rebutted the presumption under the fourth method listed in Labor's regulation. The ALJ also concluded that the miner was not totally disabled as a result (in whole or in part) of pneumoconiosis, so that the presumption had been rebutted under the third method as well. The Fourth Circuit concluded that Labor's four rebuttal methods "permit rebuttal of more elements of entitlement to benefits than do the interim HEW regulations which permit rebuttal solely through attacks on the element of total disability," and held that they were contrary to Section 402(f)(2). 895 F.2d at 182-183.

Accord *Dayton* v. *Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990), petition for cert. pending, No. 90-114 (filed July 17, 1990).[2]

In *Taylor* v. *Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), petition for cert. pending, No. 89-1696 (filed May 2, 1990), an ALJ concluded that the presumption had been rebutted under Labor's second method because the medical evidence showed only a mild respiratory impairment that did not prevent the miner from doing his usual coal mine work. 892 F.2d at 505. The ALJ awarded benefits, however, on the theory that HEW's second rebuttal method required proof not only that the miner was able to work, but also that the miner could actually obtain work. The court of appeals, in affirming the award, spoke broadly. In the order issued on rehearing, the court said that it had "held that to the extent the Department of Labor regulations allow rebuttal—when HEW's do not—the Labor rules are invalid." Pet. App. 2a.[3]

[2] In *Taylor* v. *Clinchfield Coal*, the Fourth Circuit found no substantial evidence of rebuttal under Labor's third method, but suggested that HEW's regulation might have allowed a third method of rebuttal "similar" to Labor's third method, and remanded for consideration of that issue. 895 F.2d at 183. In an unpublished decision following *Taylor* v. *Clinchfield Coal*, the court concluded that this suggestion was "dicta" and that HEW's regulation allowed only two rebuttal methods. *Robinette* v. *Director, OWCP*, No. 88-1144 (4th Cir. Apr. 27, 1990), slip op. 8 & n.9, petition for cert. pending (filed July 25, 1990). See also *Krahel* v. *Consolidation Coal Co.*, No. 89-2394 (4th Cir. Apr. 5, 1990) (unpublished), slip op. 5-6 ("we have recently held that application of the rebuttal provisions of 20 C.F.R. § 727.203(b)(3) and (4) violates 30 U.S.C. § 902(f)").

[3] Although Labor's third rebuttal method was not directly at issue in *Taylor* v. *Peabody Coal*, the author of the panel opinion in that case subsequently stated that "this court held in *Taylor* v. *Peabody Coal* * * * that § 727.203(b)(3) was invalid." *Meyer* v. *Zeigler Coal Co.*, 894 F.2d 902, 905 n.3 (7th Cir. 1990), petition for cert. pending, No. 89-7383 (filed Apr. 27, 1990).

The courts of appeals have acknowledged the conflict. Both the Fourth Circuit, 895 F.2d at 183 n.2, and the Seventh Circuit, 892 F.2d at 506, noted their disagreement with the approach of the Sixth Circuit. The court below, in turn, noted the conflict between the Sixth and Seventh Circuits "as to issues similar to those before us," and declined to attempt to harmonize the decisions. Pet. App. 19a. And the dissenting judge on the Fourth Circuit recognized the conflict among the circuits and stated that "[i]t seems to me that by adopting the views of the Third and Sixth Circuits concerning these murky and confusing regulations we [would] do less violence to congressional intent, and [would] avoid both upsetting the statutory scheme and raising due process problems." 895 F.2d at 184; see also *Robinette* v. *Director, OWCP*, No. 88-1144 (4th Cir. Apr. 27, 1990), slip op. 7-8 n.8, petition for cert. pending (filed July 25, 1990) (asking the Court to "definitively resolve this conflict").

2. Although Section 402(f)(2) applies only to claims filed before April 1, 1980 (see *Sebben*, 109 S. Ct. at 418-419), the conflict among the four courts of appeals can still be expected to have a significant, detrimental impact on the administration of the black lung program. An estimated 2,000 to 3,500 claims governed by Section 402(f)(2) are still in litigation, and about 83% of them arise in the Third, Fourth, Sixth, and Seventh Circuits. Because the validity of Labor's rebuttal provisions appears to be the only substantial legal question remaining concerning the application of Section 402(f)(2), we believe that a very high percentage of the outstanding claims are affected by the conflict.

The present value of a single black lung claim has been estimated at between $118,316 and $185,656. See Employment Standards Admin., United States Dep't of Labor, *Annual Report on Administration of the Black Lung Benefits Act for Calendar Year 1979*, at 32 (1980). Thus, the claims are of great importance to the individual claimants and, given their cumulative value (as much as $650 million), of great importance to the coal industry.

There is, in our view, one substantial question as to whether this case, rather than one of the Fourth Circuit cases in which a petition for a writ of certiorari is pending, is the most appropriate vehicle for resolution of the existing conflict. As noted (see note 1, *supra*), Mr. Pauley died in 1988 and his widow was not promptly substituted as claimant. The failure to effect her substitution raises the question whether Mrs. Pauley was entitled to petition for certiorari in light of "the general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom." *Karcher* v. *May*, 484 U.S. 72, 77 (1987) (citations omitted). Since the statute provides benefits to survivors as well as miners and expressly states that survivors of eligible miners are not required to refile or otherwise validate the miners' claim (see note 1, *supra*), we believe that Mrs. Pauley is the proper party and that substitution *nunc pro tunc* is appropriate. However, the Benefits Review Board recently decided that it lacks jurisdiction to consider the government's unopposed substitution motion. *Ibid.* The government intends to seek reconsideration of this ruling, but in view of this substitution issue, which is not in itself one warranting this Court's attention, the Court may wish to hold this case and to grant plenary review in one of the Fourth Circuit cases.[4]

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[4] For the reasons more fully stated in our brief in response to the certiorari petition in that case, we believe that, of the petitions that are currently before the Court, *Consolidation Coal Co.* v. *Dayton*, No. 90-114, is the most appropriate of the Fourth Circuit cases for plenary review.

CONCLUSION

The petition for a writ of certiorari should either be granted or held and disposed of as appropriate in light of the disposition of *Consolidation Coal Co.* v. *Dayton*, No. 90-114.

Respectfully submitted.

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